

In re Miller, 1990 WL 517059 (Bankr.S.D.Ga., Jun 27, 1990) (NO. 89-11557)
IN THE UNITED STATES BANKRUPTCY COURT

FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>89-11557</u>
MARK JOHN MILLER)	
BETTY ANN MILLER)	
)	
Debtors)	
<hr/>)	
)	
JAMES D. WALKER, JR., TRUSTEE)	
)	
Movant)	FILED
)	at 5 O'clock & 00 min P.M.
vs.)	Date 6-27-90
)	
MARK JOHN MILLER)	
BETTY ANN MILLER)	
)	
Respondents)	

ORDER

James D. Walker, Jr., trustee in this Chapter 7 bankruptcy proceeding objects to the B-4 Schedule of Exempt Property claimed by the debtors. Prior to the hearing on the objection, the trustee and the lawyer for the debtors filed a stipulation of facts and stipulation as to admissibility of documents. The stipulated facts are as follows.

1. The debtor, Mark John Miller had a retirement investment annuity with the Principal Financial Group, Annuity No. 78521-350421015, with such account valued at Thirteen Thousand Three Hundred Ninety-Seven and 61/100 (\$13,397.61) Dollars at the time of

the debtors' filing of a petition in bankruptcy.

2. The retirement investment annuity with the Principal Financial Group was established by the debtor Mark John Miller from funds rolled over into such

account from a 401K Plan.

3. Participation by Mark John Miller in the Principal Financial Group Retirement Investment Annuity was voluntary, and debtor Mark John Miller had the right to make withdrawals from the account at any time, subject to withdrawal charges of the Principal Financial Group and to any tax consequences.

4. The debtor Mark John Miller had an IRA with Prudential-Bache Securities, Inc.

5. From the stipulated documentation, the term "IRA" used in the stipulation means Individual Retirement Account as defined at 26 U.S.C. §408(a). From the stipulated documentation, the value of the IRA of Mark John Miller as of the time of filing of this Chapter 7 proceeding was Eleven Thousand Eight Hundred Sixty-Nine and No/100 (\$11,869.00) Dollars.

6. The debtor Betty Ann Miller had an IRA with Prudential-Bache Securities, Inc. with a net worth of Four Thousand Five Hundred Ninety-Two and No/100 (\$4,592.00) Dollars at the time of such debtor's filing of a petition in bankruptcy.

7. Participation by the debtors in the Prudential-Bache Securities, Inc. IRA plans was voluntary, and the debtors had the rights to withdraw all or part of these funds at any time or to terminate such account at any time.

8. The debtors Mark John Miller and Betty Ann Miller had a joint checking account, Account No. 959108341, with Maryland National Bank having a balance of Five Thousand Three Hundred Ninety-Five and 84/100 (\$5,395.84) Dollars as of the time of the bankruptcy filing.

9. The debtors Mark John Miller and Betty Ann Miller had a joint checking account with Bankers First, Account No. 0026062026, with a balance of Two Thousand Six Hundred Seventy-Eight and 68/100

(\$2,678.68) Dollars as of the time of filing bankruptcy.

10. The debtor Mark John Miller had a money-market with Prudential-Bache Securities, Inc. with a balance of One Thousand Five Hundred Thirty-Two and 20/100 (\$1,532.20) Dollars as of the time of filing bankruptcy.

11. The debtors Mark John Miller and Betty Ann Miller had a joint money-market account with IDS, with a balance of Five Hundred Eighty-Two and 69/100 (\$582.69) Dollars as of the time of filing the petition in bankruptcy.

12. The debtor Mark John Miller owned a coin collection valued at Five Hundred and No/100 (\$500.00) Dollars as of time of his filing bankruptcy.

13. The debtor had a life insurance policy with Equitable Financial having a cash value of Four Thousand Six Hundred Fifty-Eight and No/100 (\$4,658.00) Dollars. The debtor intends to redeem this policy by payment to the trustee of the difference between a cash value and the exemption available to him under Official Code

of Georgia Annotated (O.C.G.A.) §44-13-100(a)(9).

14. If the debtor Mark John Miller is entitled to exempt the entire corpus of the funds of his retirement investment annuity with the Principal Financial Group and in his IRA with PrudentialBache Securities under O.C.G.A. §44-13-100(a)(2.1), the debtor must then account to the trustee in the amount of Nine Hundred Sixty and 81/100 (\$960.81) Dollars in addition to the funds necessary to redeem the cash value of the life insurance under the above referenced stipulation.

15. If the debtor Mark John Miller is not entitled to exempt the corpus of the funds of his retirement investment annuity with the Principal Financial Group and in his IRA with Prudential

Bache Securities under O.C.G.A. §44-13-100(a)(2.1), such debtor must account to the trustee in the sum of Twenty-Six Thousand Two Hundred Twenty-Seven and 42/100 (\$26,227.42) Dollars.

16. If the debtor Betty Ann Miller is entitled to exempt the entire corpus of the funds of her IRA account with PrudentialBache Securities under O.C.G.A. §44-13-100(a)(2.1), such debtor will not have to account to the trustee for any assets.

17. If the debtor Betty Ann Miller is not entitled to exempt the entire corpus of the funds of her IRA with PrudentialBache Securities under O.C.G.A. §44-13-100(a)(2.1), such debtor must account to the trustee in the amount of Three Thousand Five Hundred Twenty and 61/100 (\$3,520.61) Dollars.

18. The Prudential-Bache Securities IRAs and the

Principal Financial Group Retirement Investment Annuity are not retirement or pension plans maintained for a public officer or employee of the State of Georgia or a political subdivision of the State of Georgia nor one maintained by a nonprofit corporation qualified as an exemptible organization.

19. The debtors are not currently receiving or entitled to receive payments under the Prudential-Bache Securities IRA Plan or the Principal Financial Group Retirement Investment Annuity.

20. In addition to the foregoing written stipulations submitted at hearing on the objection, the trustee and the debtors' lawyer stipulated that the corpora of the IRA's and the Retirement Investment Annuity are property of the estate as defined under 11 U.S.C. §541.

The issue submitted is whether the debtors can exempt under O.C.G.A. §44-13-100(a)(2.1)(C) the entire corpora of funds in the IRA accounts and the retirement investment annuity. These funds are not exemptible under this code

provision. The State of Georgia has opted out of the exemptions available under federal law and established its own set of exemptions available in bankruptcy to individual debtors domiciled in Georgia. 11 U.S.C. §522(b)(1); O.C.G.A. §44-13-100(b). The provision of the Georgia exemptions applicable in this proceeding is found in O.C.G.A. §44-13

100(a)(2.1).¹ The debtors maintain that the corpora of their IRA accounts and the

¹O.C.G.A. §44-13-100(a)(2.1) provides in pertinent part:

(a) . . . any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property: . . .

(2.1) The debtor's aggregate interest in any funds or property held on behalf of the debtor, and not yet distributed to the debtor, under any retirement or pension plan or system:

(A) Which is: (i) maintained for public officers or employees or both by the State of Georgia or a political subdivision of the State of Georgia or both; and (ii) financially supported in whole or in part by public funds of the State of Georgia or a political subdivision of the State of Georgia or both;

(B) Which is: (i) maintained by a nonprofit corporation which is qualified as an exempt organization under Code Section 48-7-25 for its officers or employees or both; and (ii) financially supported in whole or in part by funds of the nonprofit corporation; or

(C) To the extent permitted by the bankruptcy laws of the United States similar benefits from the private sector of such debtor shall be entitled to the same treatment as those

retirement investment annuity are exemptible under

O.C.G.A. §44-13-100(a)(2.1)(C). While agreeing with the trustee that the corpora of the accounts are not exemptible under this code provision, this court reaches that conclusion on different grounds than that urged by the trustee.

The trustee relies upon the analysis of In re: Herndon, 102 B.R. 893 (Bankr. M.D. Ga. 1989). Herndon deals with a similar claim of exemption asserted by a debtor for the corpus of a tax sheltered annuity plan which plan is basically the same as the retirement investment annuity in this case. Under Herndon, the court determined that O.C.G.A. §44-13-100(a)(2.1)(C) "provides that a debtor's aggregate interest in certain retirement or pension plan funds held by the private sector are entitled to exemption if periodic payments made from the plan meet the requirements of section (a)(2)(E) [of O.C.G.A. §44-13-100.]" Herndon, supra at 895. This court respectfully disagrees with that interpretation of subparagraph (C) of paragraph 2.1. Paragraph 2.1 establishes the exemptibility of the corpus of a retirement plan in the limited circumstances described in subparagraphs (A), (B) or (C). The language relied upon in Herndon "provided that the exempt or nonexempt status of periodic payments from such a retirement or pension plan or system shall be as provided under subparagraph (E) or paragraph (2) of this subsection" is not a part of subparagraph (C). This portion of 2.1 merely establishes that 2.1 may be relied upon by a debtor

specified in subparagraphs (A) and (B) of this paragraph,

provided that the exempt or nonexempt status of periodic payments from such a retirement or pension plan or system shall be as provided under subparagraph (E) of paragraph (2) of this subsection.

in exempting the corpus of a retirement plan meeting the definitional limitations set forth in (A), (B) or (C),

but the exemptibility of any periodic payments received by a debtor is determined under O.C.G.A. §44-13-100(a)(2)(E).² The quoted provision of paragraph 2.1 relied upon in Herndon does not limit the types of retirement plans for which the corpus is exemptible. The language merely establishes that retirement plan corpus exemptibility is determined under 2.1 and periodic payment exemptibility is determined under (2)(E).

Additionally, the trustee relies upon Mackey v. Lanier Collections Agency and Service, Inc., 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). Mackey deals with the preemptive status of the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. §1001 et. al. ERISA does not apply to IRA's or individual retirement annuities. In re: Ewell, 104 B.R. 458, 461 (Bankr. M.D. Fla. 1989); In re: Martin, 102 B.R. 639 (Bankr. E.D. Tenn. 1989).³

²O.C.G.A. §44-13-100(a)(2)(E) provides in pertinent part:

(a) . . . any debtor who is a natural person may exempt, pursuant to this article; for purposes of bankruptcy, the following property: . . .

(E) A payment under a pension, annuity or similar plan or contract on account of illness, disability, death, age, or length of service to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

³Although the courts in Martin and Ewell reached a different result than the result reached by this court, the courts based that result on the exemption provided for under the laws of the States of Tennessee and Florida. The exemption provision relating to retirement benefits in those states was drafted

The preemptive effect of ERISA has no bearing on the accounts under consideration.
See also 29 U.S.C. §1003.

The corpora of the retirement accounts in question are not exemptible because the accounts do not meet the definition of a retirement or pension plan or system set forth in paragraph 2.1. Under subparagraph (C) similar benefits from the private sector are entitled to the same treatment as those benefits provided under a retirement or pension plan or system described in subparagraph (A) and (B) which are financially supported in whole or in part by the debtor's employer. In the present case, neither the IRA's nor the retirement annuity were retirement plans financially supported in whole or in part by the debtors' employers.

Under subparagraph (A) of paragraph 2.1, a retirement system "means any retirement or pension plan or any other plan or program which is maintained by an employer or maintained pursuant to law or other authority of an employer for the purpose of paying benefits to employees or their beneficiaries after employees cease active employment by retirement, disability, death, or other termination. . . .

The term retirement system shall not include an individual retirement account or other plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participants account and

broadly to encompass IRA's and individual retirement annuities.
The Georgia statute

provides only a narrow exemption which does not encompass IRA's
and individual retirement annuities.

any income, expense, gains, and **losses** and any forfeitures of accounts of other participants which may be allocated to the participants account." O.C.G.A. §47-20-3(23). As subparagraph (C) of paragraph 2.1 requires that similar benefits in plans from the private sector receive the same treatment as those benefits available under this paragraph for public supported retirement systems, the general definition applicable under 2.1, to a "retirement system" in the public sector applies equally to the types of private sector retirement plans provided for in paragraph 2.1. The same protection is afforded the corpus of similar plans of both the public and private sectors. The definition of "retirement system" specifically excludes individual retirement accounts and by description individual retirement annuities.

Based upon the stipulations submitted, it is therefore ORDERED that the debtor Mark John Miller account to James D. Walker, Jr., trustee in the sum of Twenty-Six Thousand Two Hundred TwentySeven and 42/100 (\$26,227.42) Dollars and that the debtor Betty Ann Miller account to James D. Walker, Jr., trustee in the amount of Three Thousand Five Hundred Twenty and 61/100 (\$3,520.61) Dollars. Further ORDERED that judgment issue in such amounts providing for Future interest at such rate as determined by law.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 27th day of June, 1990